TAN YANG LONG & ANOR.

v.

NEWACRES SDN. BHD.

HIGH COURT MALAYA, SHAH ALAM
MAHADEV SHANKAR J
[ORIGINATING SUMMONS NO. 24-10-89]
29 AUGUST 1991

LAND LAW: *Conveyancing - Sale and purchase of apartment - Late delivery - Locus standi of purchaser to sue - Loan agreement with finance company - Whether assignment in legal terms - No title in existence at date of execution of assignment - Legal right to title deed - Redemption clause - Equity - Whether entitled to claim damages only on completion - Refusal of vendor to advise of completion date - Fundamental breach of contract - Delay and laches - Housing Developers (Control & Licensing) Act 1966.*

On 18 March 1985, the plaintiffs entered into a written agreement to purchase an apartment from the defendants. The agreement was subject to the Housing Developers (Control & Licensing) Act 1966 (the Act). The said apartment was to be ready for occupation on or before 17 March 1988 and time was to be the essence of the agreement. The defendant undertook to use its best endeavours to arrange a loan of up to RM62,580 for progress payments towards the purchase price.

By 1 June 1987, the plaintiffs had made payments amounting to 50% of the purchase price and a further RM2,616 in fees and disbursements.

Under an assignment dated 10 June 1987 between the plaintiffs, the defendant and M, the balance of the purchase price was to be paid by M directly to the defendant and debited to the plaintiffs. The defendant and M were subsidiaries of MB Co. The plaintiffs sought a declaration that they were no longer bound by the sale and purchase agreement and claimed the return of RM47,316 plus interest, damages and costs.

It was the defendant's contention that the plaintiffs have no *locus standi* and that the only remedy which the plaintiffs had were liquidated damages as provided by the Act and further, that no damages need be paid until the day when the building is completed and vacant possession is delivered.

Held:

[1] Clause 2.4 of the assignment clearly shows that the legal right to the title deed continued to be vested in the plaintiffs who were only required to charge the property to M as and when the separate document of title was issued whilst remaining on record as legal owners. An absolute assignment would have resulted in the property being vested in the name of M, which was not the case here. Therefore, the plaintiffs had the necessary capacity to sue.

[2] In addition, there was a redemption clause in the assignment and the plaintiffs had tendered the full amount of the loan to M. Therefore, there was an immediate legal duty upon M's part to reassign their rights under the agreement which they failed to do. Equity must regard that as done which ought to be done. The total failure of the defendant to give any credible assurances as to if and when the project would be completed to amount to a renunciation or abandonment of the agreement. Their conduct amounted to a fundamental breach of the contract.

[3] The agreement provides that liquidated damages of 8% of the purchase price for each day's delay until actual delivery of vacant possession is payable; these liquidated damages are further stated to be calculated from day to day which implies a right to be paid on a day to day basis as long as the default continues.

[4] The obligation to pay liquidated damages is only one remedy for late delivery which if accepted will be in substitution of all others.

[5] The delay by the plaintiffs in filing the action was not fatal because it was reasonable for the plaintiffs to wait until February 1988 before rescinding a contract which the defendants had evinced an intention not to be bound by.

[Plaintiff's application allowed; defendant's application for stay of execution rejected.]

[**Ed. note:** The defendant has appealed to the Supreme Court.]

Cases referred to:
Nouvau Mont Dor (M) Sdn. Bhd. v. Faber Development Sdn. Bhd. [1985] CLJ (Rep) 231 ***(cit)***
Hoo See Sen & Anor. v. Public Bank Bhd. & Anor. [1988] 1 CLJ (Rep) 125 ***(cit)***
Law Ngei Ung & Anor. v. Tamansari Sdn. Bhd [1989] 2 CLJ (Rep) 44 ***(foll)***
Loh Wai Lian v. S.E.A. Housing Corporation Sdn. Bhd. [1987] 2 MLJ 1 ***(not foll)***
Phang Hon Chin v. Nahar Singh [1986] 2 MLJ 146 ***(not foll)***

Legislation referred to:
Courts of Judicature Act 1964, s. 68(1)(a)

For the plaintiff - S. Sivasubramaniam; M/s. Siva, Ram & Associates
For the defendant - K.S. Tan; M/s. Allen & Gledhill

JUDGMENT

Mahadev Shankar J:

This is an application for a declaration that the plaintiffs are no longer bound by an agreement for the purchase by them of an apartment in Taman Sri Muda Shah Alam and for various consequential orders. The defendant (hereinafter referred to as "Newacres") and Metroplex Leasing and Credit Corporation Sdn. Bhd. (hereinafter referred to as "Metroplex"), are both subsidiaries or associates of Metroplex Bhd. Indeed all of them have their registered office at the same address that is 10th Floor, Wisma Equity, No. 150, Jalan Ampang, Kuala Lumpur.

On 18 March 1985 the plaintiffs entered into a written agreement (the agreement) to purchase the aforesaid apartment for RM89,400. The agreement was subject to the Housing Developers (Control and Licensing) Act 1966 (the Act). The said apartment was to be ready for occupation in thirty-six months that is on or before 17 March 1988 (Clause 13.1). By Clause 6 of the said agreement time was made of the essence of the agreement. Newacres undertook to use its best endeavours to arrange a loan of up to RM62,580 for progress payments towards the purchase price.

By 1 June 1987 the plaintiffs had already paid Newacres RM44,700 to make up 50% of the purchase price and a further RM2,616 in fees and disbursements.

The plaintiffs had applied to Metroplex on 1 September 1985 for a loan. In view of the special relationship of Metroplex to Newacres the money to be advanced by Metroplex was to be paid direct to Newacres and debited to the plaintiffs on terms which were reflected in what Metroplex chose to describe as a deed of assignment (the assignment). This document is

dated 10 June 1987 and it was prepared by Metroplex's solicitors. The assignment was a tripartite agreement to which the plaintiffs, Newacres and Metroplex were parties.

Ostensibly the intent of the assignment was that the plaintiffs assigned all their rights under their sale & purchase agreement with Newacres to Metroplex, in return for a commitment from Metroplex that they would pay Newacres a sum of RM45,000 (the loan) towards the plaintiffs' obligations under the sale & purchase agreement. Since there was no separate title to the said apartment when the assignment was executed it was provided by Clause 2.4 thereof that when at some time in the future a separate document of title came into existence, if money was still owing by the plaintiffs to Metroplex, the plaintiffs would charge the said title to Metroplex as security for the moneys advanced by Metroplex to Newacres.

Reading the assignment as a whole it is clear that even though it is called an assignment, it is not in fact an assignment in the sense in which that word is understood in legal parlance. Thus the plaintiffs continued to be fully liable to Newacres for the performance of all their obligations thereunder **including** their obligation to pay the balance of the purchase price. In no sense was Metroplex ever to become the owners of the apartment by virtue of the loan; so there was no assignment of the beneficial interest in the apartment by way of transfer. In short if this agreement could be called an "assignment" at all, it was only an assignment by way of a charge. In reality it was nothing more then a loan agreement by which the plaintiffs pledged that when able so to do they would create a legal charge over the apartment to Metroplex provided moneys were still owing. In the meanwhile Clause 3 of the assignment gave the plaintiffs an absolute right to redeem the loan at any time. It provided:

> If the assignor shall pay to the lender the loan, interest thereon and all monies payable by the assignor to the lender under the memorandum in the manner prescribed in the memorandum and the transfer and the charge referred to in clause 2.4 shall not then have been effected, the lender will, at the request and cost and expense of the assignor, re-assign the sale and purchase agreement and the said property comprised therein to the assignor.

Contrary to their obligations under the agreement Newacres did not complete the apartment by 17 March 1988 or at all. In fact it has not done so to this day!

On the first day of each month from October 1988 up to 1 February 1989 the plaintiffs sent a letter to Newacres with a copy to Metroplex demanding compensation for late delivery at the rate of 8% of RM89,400. Newacres and Metroplex did not even bother to acknowledge these letters.

On 3 February 1989 the plaintiffs' solicitors wrote to Newacres with copy to Metroplex. By this letter the plaintiffs' solicitors rescinded the sale & purchase agreement and demanded payment of the full sum paid by them on account that is RM47,316. Newacres' response by letter dated 14 February 1989 was that any request for compensation was premature since delivery of vacant possession had not yet taken place, and on 22 February 1989 Newacres wrote further that the plaintiffs were not entitled to rescind.

On 3 February 1989, the plaintiffs' solicitors also wrote to Metroplex giving notice of their rescission and directed them not to release any further sums to Newacres. They asked for the balance sum owing to Metroplex and were informed in writing that this was RM324.93. This was remitted to Metroplex on 17 February 1989 by bank draft. But for reasons best known to them Metroplex chose not to cash it despite their obligations under Clause 3 of the so called assignment.

On their own accord the plaintiffs subsequently sent a further letter for compensation with a caution that legal action was being processed. Newacres chose to ignore this letter also.

These proceedings were filed in August 1989. It is a claim for the return of RM47,316, interest thereon at 8% p.a. from 3 February 1989, damages and costs.

Newacres have resisted this claim on a variety of grounds in which I found no merit. So I made an order in terms and directed that there be an enquiry as to the damages suffered by the plaintiffs.

This order was made in open Court on 31 July 1990. Newacres subsequently applied for leave to appeal which I granted upon terms.

My reasons now follow.

The defendant's first submission was that the plaintiffs have no *locus standi* by virtue of the "assignment". The defendant relied upon *Nouvau Mont Dor (M) Sdn. Bhd. v. Faber Development Sdn. Bhd.* [1985] CLJ (Rep) 231. But whether an agreement amounts to an absolute assignment or whether it only purports to be by way of a charge, must be gathered from the four corners of the instrument itself.

In the case before me although Clause 1 purported to amount to an assignment of the plaintiff's benefits under the sale and purchase agreement, the fact of the matter was that at the time the assignment was executed there was no title to the apartment in existence although sub-division had been applied for. However notwithstanding the purported assignment Clause 2.4 clearly shows that the legal right to the title deed continued to be vested in the plaintiffs who were only required to charge the property to Metroplex as and when the separate document of title was issued whilst remaining on record as legal owners. An absolute assignment would have resulted in the property being vested in the name of Metroplex in that event but that is not the case here.

Consequently I held that the plaintiffs had the necessary capacity to sue. Whilst there are some parallels between *Hoo See Sen & Anor. v. Public Bank Bhd. & Anor.* [1988] 1 CLJ (Rep) 125 the capacity of the plaintiffs in that case was not challenged.

Another reason why this submission fails is that even if the plaintiffs were under any kind of disability, (and in my view they were not, to the extent of their interest in the property), there was a redemption clause in the assignment and long before this action was filed the full amount of the loan that is RM324.93 had been tendered to Metroplex by bank draft on 17 February 1989. There was an immediate legal duty upon the part of Metroplex to reassign their rights under the agreement which they failed to do. Equity in this respect must regard that as done which ought to have been done.

Metroplex and Newacres were sister companies, so to speak, and their conduct in ignoring or brushing aside the pleas of the plaintiffs was callous. The *locus standi* was raised for the first time in these proceedings, and was clearly an afterthought.

The substantial defence of Newacres is that the only remedy which the plaintiffs have is for liquidated damages as provided by the Act and nothing else. As to this, the defendant says that no matter how long delivery is delayed, no damages need be paid until the day when the building is completed and vacant possession is delivered. In the present context since it is not known when completion will take place, the defendant is urging that the plaintiffs must wait indefinitely.

I find this submission devoid of merit, and quite unconscionable.

Clause 13.2 of the agreement admittedly provides for liquidated damages of 8% of the purchase price for each day's delay till actual delivery of vacant possession but nowhere does it say

that such damages are not to be paid unless and until vacant possession is actually delivered. On the contrary it provides that such liquidated damages are to be calculated from day to day which implies a right to be paid on a day to day basis as long as the default continues.

In this case Newacres disregarded the plaintiffs' claim for liquidated damages. I do not need to consider what may have happened if they had paid it from time to time. Time was of the essence. By February 1989 there was a delay of nearly a year. I regard the total failure of Newacres to give any credible assurance as to if and when the project would be completed to amount to a renunciation or abandonment of the agreement. Their conduct amounted to a fundamental breach of contract. *Law Ngei Ung & Anor. v. Tamansari Sdn. Bhd.* [1989] 2 CLJ (Rep) 44 is very much in point.

Mr. Tan who urged everything which could be said for Newacres relied very heavily on *Loh Wai Lian v. S.E.A. Housing Corporation Sdn. Bhd.* [1987] 2 MLJ 1 and particularly on the 2nd paragraph at p. 4 as supporting his proposition that the only remedy a purchaser has in these circumstances is a cause of action for liquidated damages, and that in all cases this cause of action does not accrue until the day when vacant possession is delivered because it is only on that day that the single sum to be paid can be ascertained and so only thereby becoming due and be sued for.

With respect I am unable to agree that the case supports such a sweeping proposition. The obligation to pay liquidated damages is only one remedy for late delivery which if accepted will be in substitution of all others.

The judgment of Y.A. Haji Abdul Malek in *Chye Fook & Phan Chooi Ling v. Teh Teng Seng Realty Sdn. Bhd.* [Ipoh High Court Civil Suit No. 22-38-87-Unrep.] makes this abundantly clear, (see especially paras. 9 to 16) and I would respectfully follow it here.

It was further submitted by Newacres that in asking for liquidated damages the plaintiffs waived their right to rescind. But the answer to this is that the defendant did not recognise the existence of these demands let alone the plaintiffs' right to make them.

As for laches and delay admittedly the plaintiffs' filed their action only in August 1988 some seventeen months after delivery should have been effected. I hold this is not fatal because it was reasonable for the plaintiffs to wait till February 1988 before rescinding a contract which the defendants had evidenced an intention not to be bound by.

Consequently I gave judgment to the plaintiffs and ordered damages to be assessed. This was on 31 July 1990.

Leave to appeal where it is required should be promptly applied for. The defendant's application came before me four days before time would have run out. There was also an application for stay of execution.

Sivasubramaniam opposed leave. He relied upon the observations of Y.A. Edgar Joseph J in *Phang Hon Chin v. Nahar Singh* [1986] 2 MLJ 146 and also submitted that until the damages had actually been assessed any appeal would be premature.

With respect the order to pay RM47,316 with interest thereon was a final order which falls within s. 68(1), (a) of the Courts of Judicature Act. There are points of law here which it is desirable to have ventilated in the Supreme Court so I gave leave.

I was not impressed by the defendant's supporting affidavit to the extent that it sought to adduce new evidence which was clearly available earlier or to raise points which were not raised before me. Leave is discretionary and may be granted upon terms. As I have earlier

stated I found the conduct of Newacres and Metroplex unconscionable in deliberately keeping the plaintiffs out of their money and providing no credible assurances about their ability or willingness to complete the contract. I therefore ordered that the full sum of RM47,316 with interest up-to-date to be paid by the defendants to the plaintiffs within seven days.

There will be no stay of execution and the plaintiffs are at liberty to have their damages assessed so soon as they may be heard.

Also found at [1992] 1 CLJ 211